FILED
2017 Sep-27 AM 11:38
U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

DAVID STEWART,

Plaintiff,

v.

FEHRER AUTOMOTIVE NORTH AMERICA, LLC

Defendant.

Civil Action No.:

COMPLAINT

I. INTRODUCTION

Plaintiff David Stewart brings this action under the Family Medical Leave Act ("FMLA"), 29 U.S.C. 2611, et. seq., and the Americans with Disabilities Act, “ADA”), 42 U.S.C. 12111 *et seq.,* as amended. Plaintiff alleges that, in violation of the law, Defendant interfered with Plaintiff’s rights under the FMLA and failed to accommodate his disability. Plaintiff also alleges violations of Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e *et seq.,* as amended. Plaintiff is entitled to equitable relief as well as compensatory, liquidated and punitive damages, attorneys fees and costs.

II. JURISDICTION

1. This Court has jurisdiction in accordance with 28 U.S.C. § 1331, 1343, 2201, 2202, 42 U.S.C. § 12117, and 42 U.S.C. § 12133. Venue is proper pursuant to 28 U.S.C. § 1391.

2. Plaintiff has fulfilled all conditions precedent to the institution of this action under Title I of the ADA and under Title VII. Plaintiff timely filed his charge of discrimination within 180 days of the occurrence of the last discriminatory act. Plaintiff also timely filed his Complaint within ninety (90) days of the receipt of a Notice of Right to Sue issued by the EEOC. The FMLA does not require the exhaustion of administrative remedies.

III. PARTIES

3. Plaintiff, David Stewart, is an openly gay, male citizen of the United States and a resident of the State of Alabama. Plaintiff is a person with a disability as that term is defined under the ADA. Plaintiff also has a serious health condition under the FMLA and he was an employee eligible for benefits under that statute for the relevant time period.

4. Defendant, Fehrer Automotive North America, LLC (hereinafter "Fehrer") is an 'employer' under the FMLA, 29 U.S.C. 2611(4), the ADA, 42 U.S.C. 12111(5), and Title VII. Fehrer owns and operates a manufacturing plant in Gadsden,

Alabama.

IV. FACTS

5. Plaintiff David Stewart began working at Fehrer's plant in Gadsden Alabama, on or about December 7, 2014, as an assembler.

6. At that time, Stewart was a temporary employee placed at Fehrer by First Choice, a temporary services agency. Although First Choice paid Stewart, Stewart's daily activities while working at Fehrer were controlled by Fehrer. For example, Fehrer controlled Stewart's work hours and work assignments.

7. As an assembler, Stewart worked on an assembly line doing wire placement and snap pins; he performed his job well.

8. Stewart's supervisor was Jim Hughes, a Fehrer manager.

Hughes did not like the fact that Stewart did not act in a stereotypically masculine manner.

9. For example, when Stewart would wear make up to work, wear a wig, or have his hair fixed, Hughes would spend more time in Stewart's area of the assembly line and stare at Stewart. Hughes would also tell other employees to walk by Stewart's spot on the line to look at and make fun of Stewart's appearance.

10. Other line leaders (below Hughes in the chain of command but above Stewart) would walk by Stewart and laugh at him. Hughes knew that this upset

Stewart, but Hughes did nothing to stop the conduct.

11. Stewart also noticed that Hughes would reprimand Stewart for very trivial performance issues but Hughes would ignore similar issues for male employees who Hughes believed acted in a more traditional 'male' manner.

12. As Stewart continued to work at Fehrer, he observed that other temporary employees who began working at Fehrer around the same time as Stewart were getting hired full-time, but Stewart was not.

13. Because Hughes played an important part in determining which temporary workers got hired on full time in Stewart's area of the plant, Stewart became concerned that Hughes was responsible for Stewart's continued temporary status. In May of 2015, Stewart complained to Human Resources and on May 24, 2015, was hired on full time as an assembler for Fehrer.

14. Stewart continued to perform his job well.

15. Hughes continued to harass Stewart, based on Stewart's failure to conform to typical ideas of 'male' behaviors and mannerisms.

16. After having significant difficulty breathing for several days, on August 28, 2015, Stewart went to the Gadsden Regional Medical Center Emergency Room. He was diagnosed with Chronic Obstructive Pulmonary Disease. At that time, he also had an upper respiratory infection, which made the symptoms of his COPD worse.

Stewart was prescribed medicine and given instructions for necessary follow-up physician visits.

17. Stewart informed Human Resources about his medical condition. On Thursday, January 7, 2016, Stewart experienced significant difficulty breathing. These symptoms indicated a flare-up of his COPD. As a result, he requested two days of 'PTO' (paid time off) for that Friday and following Monday.

18. On Friday, January 8, Stewart called Human Resources to make sure there was no problem with his PTO request. Mandy Elliot, the Human Resources manager, told Stewart that he sounded very sick and advised him to go to the hospital. Elliot also said that she would get back with Stewart about the PTO.

19. Later that same day, Elliot called Stewart back. She said Hughes had been contacted about the PTO and everything was ok.

20. Although Stewart's employer knew about his condition, FMLA leave was not offered. Stewart received no FMLA notice.

21. On Tuesday, January 12, Stewart returned to work as planned. Stewart continued working; no one said anything about his absence from work on January 8 and 11.

22. Reviewing his next paycheck, Stewart saw that the PTO for January 8 and 11 was not listed. Stewart informed Human Resources and the PTO hours were

included on the next paycheck. Stewart continued working.

23. On March 29, 2016, the lead person in Stewart's area of the assembly line said that Hughes wanted Stewart to gather all his belongings and go to the office.

24. In the office, Hughes showed Stewart a document saying Hughes had denied Stewart's PTO back in January and instead counted him as a "no call/no show". This was the first time Stewart was informed about the denial.

Hughes' decision to classify Stewart's January 8 and 11 absences as 'unexcused' caused Stewart to accumulate more attendance points. As a result of the additional attendance points, Hughes said Stewart was fired.

25. Plaintiff's January 8 and 11, 2016 absences should have been covered under the FMLA as time necessary to care for Plaintiff's own serious health condition.

26. In the alternative, Defendant, without undue hardship, could have accommodated Plaintiff's need to miss work for his disability by excusing his absences on January 8 and 11, 2016.

27. Hughes' decision to reject Stewart's PTO request and terminate Stewart was further harassment and discrimination based on Stewart's failure to conform to typical male stereotypes.

28. As a result of Defendant's actions, Plaintiff has suffered extreme harm, including, but not limited to, loss of employment, denial of wages, compensation, and

other benefits and conditions of employment. Additionally, Plaintiff has suffered injury, including pain, humiliation, mental anguish and suffering, and loss of enjoyment of life.

V. CAUSES OF ACTION

A. FMLA Interference

29. Plaintiff reasserts and incorporates by reference paragraphs 1 - 28 as set forth above as if fully restated herein.

30. Plaintiff was an eligible employee under 29 C.F.R. 825.110. He had a serious health condition pursuant to 29 U.S.C. 2612 and 29 C.F.R. 825.113 and was entitled to take leave for that serious health condition.

31. Defendant is an employer in accordance with 29 U.S.C. 2611, 29 C.F.R. 825.104, and 29 U.S.C. 825.106.

32. Plaintiff was entitled to benefits under the FMLA, but was effectively denied FMLA benefits in violation of the 29 C.F.R. 825.220. Defendant also interfered with Plaintiff's rights to benefits under the FMLA.

33. Defendant violated the Family Medical Leave Act, 29 U.S.C. 2614, inter alia, by failing or refusing to approve leave, by disciplining Plaintiff for absences that should have been covered under the FMLA, and by terminating Plaintiff.

34. Defendant also failed to provide Plaintiff with timely notice of his rights

under the FMLA. 29 C.F.R. 825.300.

35. Defendant's actions were willful and unreasonable.

36. As a result of Defendant's actions and inactions, Plaintiff has suffered extreme harm, including, but not limited to, loss of employment opportunities, denial of wages, compensation, and other benefits and conditions of employment. Additionally, Plaintiff has suffered injury including pain, humiliation, mental anguish and suffering, and loss of enjoyment of life.

B. Title I of The Americans With Disabilities Act – Disparate Treatment and Failure to Accommodate Theories.

37. Plaintiff realleges and incorporates by reference paragraphs 1 through 28 above with the same force and effect as if fully set out in specific detail herein below.

38. Under Plaintiff's disability discrimination claim, Plaintiff states that (1) he is disabled within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job with or without a reasonable accommodation; and (3) he suffered adverse employment decisions because of the disability.

39. Plaintiff is an individual with a disability under the ADA in that he has a condition which substantially limits at least one major life activities and/or he is regarded as such and/or has a record of a disability. 42 U.S.C. 12102. Plaintiff's

chronic obstructive pulmonary disease causes substantial limitations in Plaintiff's breathing and lung functioning.

40. Defendant has intentionally with deliberate indifference discriminated against Plaintiff and has terminated Plaintiff on the basis of his disability. 42 U.S.C. 12112.

41. Defendant has imposed rules and standards which are not consistent with business necessity. These rules as applied have the effect of discriminating against the Plaintiff on the basis of his disability. 42 U.S.C. 12112(b)(6).

42. Defendant's termination of Plaintiff was unlawful and constitutes discrimination against a qualified individual on the basis of a disability, a perceived disability and/or a record of disability.

43. Defendant has intentionally, maliciously and with reckless indifference discriminated against Plaintiff on the basis of his disability, his perceived disability and/or his record of a disability with regards to termination, employee compensation, benefits, and other terms and conditions of employment. 42 U.S.C. 12112.

44. Plaintiff requested a reasonable accommodation when he informed Defendant of his condition as well as the limitations arising from his condition and then informed Defendant of his need to take some time off work to deal with the adverse effects of his disability.

45. Defendant failed to engage in an interactive process and instead denied Plaintiff a reasonable accommodation, resulting in the termination of his employment.

46. Accommodating Plaintiff's disability would not have posed an undue hardship for Defendant.

47. Plaintiff suffered damages as a result of Defendant's actions in denying him a reasonable accommodation, failing to engage in an interactive process, and terminating his employment.

C. Discrimination in Violation of Title VII

48. The Plaintiff realleges and incorporates by reference paragraphs 1-28 above with the same force and effect as if fully set out in specific detail herein below.

49. Plaintiff is a male who does not strictly conform to commonly accepted male stereotypes.

50. During his time working at Defendant's Gadsden plant, Plaintiff's supervisor, Jim Hughes, harassed Plaintiff because of Plaintiff's failure to conform to the traditional, heterosexual male stereotype. For example, Hughes laughed and stared at Plaintiff's appearance and Hughes was more critical of Plaintiff's work performance than other similarly situated workers under Hughes' supervision.

51. Other employees also harassed Plaintiff based on his non-conforming appearance and behaviors. Hughes knew that this occurred and upset Stewart, but

Hughes did nothing to stop the conduct.

52. Plaintiff's supervisor, Jim Hughes, played an important role in determining which temporary workers under his supervision became permanent employees for Defendant. Hughes was responsible for approving leave (including PTO) for workers under his supervision.

53. Defendant violated Title VII when it failed to timely hire Plaintiff as a permanent employee. Other temporary workers who, unlike Plaintiff, conformed to their traditional gender stereotypes with respect to dress, behavior, and mannerisms, were hired by Defendant for permanent status at a faster rate than Plaintiff.

54. Plaintiff was continually harassed at work by his supervisor as well as other workers, based on his failure to strictly conform to the traditional male stereotype and was thus subject to a hostile work environment in violation of Title VII.

55. Defendant violated Title VII when it denied Plaintiff's request for PTO for January 8 and 11 and, instead, counted those absences as unexcused, which caused Plaintiff to be terminated.

56. Plaintiff was intentionally, maliciously and wilfully discriminated against and continuously harassed, and eventually terminated because of his failure to strictly conform to commonly accepted male stereotypes, in violation of Title VII

of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. 42 U.S.C. 2000, et seq.

57. As a result of Defendant's continued harassment, failure to timely hire him to permanent status, failure to approve leave, and termination, in violation of Title VII, Plaintiff suffered damages, including denial of wages, compensation, and other benefits of employment, as well as injuries including pain, humiliation, mental anguish and suffering, and loss of enjoyment of life.

VI. **RELIEF**

WHEREFORE, it is respectfully prayed that this Court grant to the Plaintiff the following relief:

a. Issue a declaratory judgment that Defendant's actions, as described in the Complaint, are unlawful and willful, in violation of the FMLA, Title I of the Americans with Disabilities Act, and Title VII;

b. Issue an Order directing and requiring Defendant to pay Plaintiff damages for mental anguish, lost wages, salary, employment benefits, or other compensation reduced, denied, or lost by reason of Defendant's FMLA, ADA, and Title VII violations;

c. Issue an Order directing and requiring Defendant to pay Plaintiff liquidated damages pursuant to the FMLA in an amount equal to and in addition to the amount of lost wages, salary, employment benefits, or other compensation owed to him, and punitive and compensatory damages pursuant to the ADA and Title VII;

d. Issue an Order directing and requiring Defendant reinstate Plaintiff, or award Plaintiff front pay if no position is available or reinstatement is not appropriate;

e. Issue and Order directing Defendant to reimburse Plaintiff for the costs and attorneys fees expended in the course of litigating this action, and pre-judgment and post-judgment interest; and

f. Provide Plaintiff with such other and further relief, as the Court deems just and equitable.

Respectfully submitted,

/s/Rocco Calamusa, Jr.
Rocco Calamusa, Jr.
Rachel L. McGinley
Attorneys for Plaintiffs

OF COUNSEL:
WIGGINS, CHILDS, PANTAZIS, FISHER & GOLDFARB, LLC
The Kress Building
301 19th Street North
Birmingham, Alabama 35203
(205) 314-0500

PLAINTIFF DEMANDS A TRIAL BY STRUCK JURY ON ALL ISSUES TRIABLE BY A JURY.

/s/ Rocco Calamusa, Jr.
OF COUNSEL

Plaintiff requests this Honorable Court to serve via certified mail upon the Defendant the following: Summons, Complaint.

Defendant's Addresses:
Fehrer Automotive North America, LLC
c/o Paracorp Incorporated, Registered Agent
2724 10th Avenue
Huntsville, AL 35805

/s/ Rocco Calamusa, Jr.
OF COUNSEL